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Supreme Court, U.S.
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No. A-710

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

RAYMOND DOBARD,
Petitioner,

VS.

SAN FRANCISCO BAY AREA RAPID TRANSIT DISTRICT, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of California
First Appellate District
Division One

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED[1]

1. Whether the Court of Appeal of the State of California, First Appellate District, Division One, wrongfully concluded that petitioner's claims that in the mid-1960's respondents fraudulently took petitioner's air rights without just compensation and thereafter sold them to the City of Berkeley, unnecessarily condemned petitioner's property for no public purpose, and condemned petitioner's property to retaliate against petitioner for filing a taxpayer's suit against respondents were barred by res judicata?

2. Whether the Court of Appeal of the State of California, First Appellate District, Division One, wrongfully concluded that respondents did not convert interest earned on the condemnation award deposited in the State Treasury and did not violate petitioner's constitutional or other rights by their actions with respect to interest earned on the condemnation award deposited in the State Treasury?

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[1] Based upon a reading of petitioner's 23 "Questions Presented for Review", Petition for Writ of Certiorari, p. 1-12, it is difficult to perceive the bases upon which petitioner relies in seeking this Court's discretionary review. However, based on the decision of Court of Appeals of the State of California, First Appellate District, Division One, and petitioner's Second Amended Complaint, the issues appear to be as set forth herein.

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No. A-710

In the Supreme Court

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October Term, 1990

Raymond Dobard,
Petitioner,

vs.

San Francisco Bay Area Rapid Transit District, et al.,
Respondents.

On Petition For Writ Of Certiorari
To The Court Of Appeals Of The State Of California
First Appellate District
Division One

RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

This Court may review the decision of the California Court of Appeal pursuant to 28 U.S.C.A. section 1257(a). In petitioner's jurisdictional statement, he incorrectly asserts that review of this case is authorized on the basis that the state court "has decided an important question of federal law which has not been, but should be, settled by this court, or has decided a federal question in a way that conflicts with applicable decisions of this court." Petition for Writ of Certiorari ("Petition"), p. 16. Neither situation is present here.

STATEMENT OF THE CASE

In the mid-1960's, respondent Bay Area Rapid Transit District ("BART") initiated an eminent domain proceeding in state court to condemn real property belonging to petitioner, in order to

construct facilities needed for rapid transit purposes. On May 3, 1966, the trial court entered a Judgment in Condemnation and a Final Order of Condemnation, providing that, having paid the required amount of compensation into court (to wit, $79,500.00), BART was the owner in fee simple absolute of the property. *See* Order of Court of Appeal of the State of California, First Appellate District, Division One ("Order"; copy appended hereto), p. A-2.

On September 2, 1966, the trial court entered an Order for Withdrawal of the Judgment Award and for Deposit in the State Treasury. The order specified that the judgment award be withdrawn from the court and deposited in the Condemnation Deposits Fund of the California State Treasury. The judgment award was deposited in the Condemnation Deposits Fund and BART informed petitioner that the funds were available for his withdrawal pursuant to court order. Petitioner chose not to withdraw the award amount until October 1970, at which time he began to withdraw the principal at intervals. Because petitioner left the funds in the State Treasury, rather than withdraw them, interest accrued. Pursuant to California Government Code section 16429, that interest was eventually paid by the State Treasury to BART. *See* Order, p. A-2.

Twenty-two years later, on September 12, 1988, petitioner sued respondents, setting forth various causes of action based on the following basic factual allegations: that respondents had condemned petitioner's real property unnecessarily, without a valid public purpose, and in retaliation against him for having filed a taxpayer's suit against BART; that BART failed to compensate him for the air rights to his property and then sold the air rights to the City of Berkeley; and that BART had misled petitioner into believing that the interest earned on the judgment deposited with the State Treasury was payable to him and converted the interest earned on the condemnation deposit to its own use. After affording petitioner two opportunities to amend his complaint to state a valid cause of action against respondents, the trial court sustained respondents' demurrer to petitioner's Second Amended Complaint without leave to amend. *See*, Order, p. A-3.

At petitioner's request, on February 16, 1989, the trial court filed a detailed Statement of Decision explaining that each of the causes of action alleged in the Second Amended Complaint failed to state a cause of action for one or more of the following reasons: (1) BART was entitled to the interest earned on the condemnation deposit, pursuant to California Government Code section 16429; (2) attacks on the propriety of the condemnation proceedings was barred by res judicata; and (3) petitioner's causes of action were barred by the statute of limitations. Petitioner filed a motion for reconsideration on February 21, 1989, which was denied by the trial court on April 6, 1989. *See*, Order, p. A-3.

Petitioner filed a notice of appeal with the Court of Appeal of the State of California, First Appellate District, Division One ("the California Court of Appeal" or "the state appellate court") on March 10, 1989. By Order filed September 26, 1990, the California Court of Appeal affirmed the trial court's judgment dismissing petitioner's Second Amended Complaint, stating:

> to the extent that each cause of action was based on the allegation that BART converted the interest on the judgment deposited in the state treasury, the demurrer as to each cause of action was properly sustained because BART was entitled to the interest on the judgment award. Moreover, to the extent that any cause of action was based on a challenge to the condemnation proceedings, that cause of action is barred by res judicata.

Order, p. A-4. Petitioner now seeks review by this Court of the decision of the California Court of Appeal. By Order filed December 12, 1990, the California Supreme Court denied petitioner's petition for review of the Court of Appeal's decision.

SUMMARY OF ARGUMENT

There are no special or important reasons justifying this Court's review of the state appellate court decision at issue herein. The state appellate court did not decide any important question of federal law, which might justify granting review of its decision. *See* Sup. Ct. R. 10.

Although petitioner claims that federal constitutional issues are involved, specifically the "taking clause" of the Fifth Amendment, applicable to the states under the Fourteenth Amendment, that claim is without merit. The interest monies which petitioner claims were wrongfully withheld from him were interest monies that accrued *post*-judgment, on funds which were available to petitioner but which he chose not to withdraw.[2] They did not represent part of the value of petitioner's real property which was the subject matter of the 1966 condemnation proceeding. Those interest monies were payable to respondents under valid state law and petitioner did not have any property interest in those monies. Therefore, respondent BART's receipt of those funds did not constitute a "taking."

The state appellate court's decision that petitioner's claims were barred by res judicata is based on valid state law. The condemnation proceeding at issue occurred in the mid-1960's. The 1966 Judgment was a final determination of BART's right to condemn petitioner's real property and the amount of just compensation to which petitioner was entitled. Additionally, petitioner's 1988 attack on that judgment was barred by the applicable statute of limitations, as the trial court ruled in sustaining BART's demurrer. No federal statutory or constitutional rights are implicated by those rulings of the state appellate and trial courts.

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[2] Petitioner also claims that BART wrongfully received $583.57 in interest accrued between March 16, 1966 to May 17, 1966. Petition, p. 6. That issue was not raised by petitioner in his Second Amended Complaint and therefore was not addressed by the trial court or the state appellate court and is not properly a subject for review by this Court. Even if it were, such interest monies are not part of the just compensation to which petitioner would be entitled, because BART did not "take" petitioner's property until after it was awarded possession of the property in May 1966.

REASONS FOR DENYING THE WRIT

I

THE INTEREST MONIES WHICH RESPONDENT BART RECEIVED WERE MONIES IN WHICH PETITIONER HAD NO PROPERTY INTEREST AND THEREFORE NO "TAKING" OCCURRED

The state appellate court correctly held that respondent BART, not petitioner, was entitled to the interest on the judgment award. Upon paying the amount which the trial court determined, in 1966, constituted "just compensation" for petitioner's property, BART became the owner of the property and took possession of that property. That full judgment amount was deposited with the State Treasury and made available to petitioner for withdrawal by him. Interest which accrued on that sum of money after it was made available to petitioner is not part of the "just compensation" ordered by the court or to which petitioner might be otherwise entitled.

What is *not* at issue here is interest to which a condemnee may be entitled due to a delay between the date the condemnor takes the condemnee's property and the date the condemnor pays compensation to the condemnee. Where such a delay occurs, the condemnee is constitutionally entitled to interest on the judgment award for the period of the delay, as part of the compensation for the taking. *See, e.g., Albrecht v. United States*, 329 U.S. 599, 602 (1947) ("just compensation" equals fair market value at time of taking plus interest from date of taking to date of payment); *United States v. Creek Nation*, 295 U.S. 103, 111 (1935) (where payment of just compensation delayed for many years after taking, payment should include interest from date of taking). In such situations, interest is awarded in order "to produce the present full equivalent of that value paid contemporaneously with the taking." *U.S. v. Creek Nation*, 295 U.S. at 111.

Here, BART did not "take" petitioner's property until *after* it paid into court the amount of just compensation to which the fact-finder determined petitioner was entitled, so there was no delay between taking of the property and payment of just compensation. The interest monies at issue in the instant case are

monies which accrued post-judgment, after the just compensation to which petitioner was entitled had been awarded and paid into the State Treasury for withdrawal by petitioner. Thus, what petitioner is seeking is not interest which represents a portion of the value of his real property, but interest which accrued on *money* which BART made available to him but which he chose not to collect.

The state appellate court correctly found that petitioner did not and could not state a cause of action based on a right to interest on the judgment award, because the interest did not belong to him. As the state appellate court stated, quoting the trial court:

> "under Code of Civil Procedure section 1268.320(b)[3] and its predecessor, former section 1255b(c),[4] interest ceased to accrue on the date the judgment funds, including interest accrued to that date, were deposited by BART in court, i.e., on May 3, 1966. Therefore, [Dobard] has not been entitled to any interest on the judgment award at any time since BART deposited the funds in court."

Order, p. A-4 to A-5.

The interest which was paid to BART, rather than to petitioner, was interest which is earned and paid out to a plaintiff pursuant to specific statutory authority. California Government Code section 16429, subdivisions (b) and (c), provides as follows:

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[3] Section 1268.320 provides in pertinent part: "The compensation awarded in the proceeding shall cease to draw interest at the earliest of the following dates: . . . (b) As to the amount deposited in accordance with Article 2 . . . the date of such deposit."

[4] Former section 1255b, subdivision (c), which was in effect at the time judgment was entered in 1966 in this case, provided in relevant part: "The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates: . . . (4) If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the defendant after entry of judgment, the date of such payment." (Stats. 1961, ch. 1614, § 10, p. 3451.)

> (b) Money in the Condemnation Deposits Fund shall be invested under the provisions of Article 4 (commencing with Section 16470) of Chapter 3.
>
> (c) The State Controller shall apportion as of June 30th and December 31st of each year the interest earned or increment derived and deposited in the fund during the six calendar months ending with such dates. *There shall be apportioned and paid to each plaintiff having a deposit in the fund* during the six-month period for which an apportionment is made *an amount directly proportionate to the total deposits in the fund and the length of time such deposits remained therein*, except that no payment shall be made of any interest in the amount of five dollars ($5) or less. Such amounts shall be transferred to the General Fund by the State Controller. The State Treasurer shall pay out the money deposited by a plaintiff in such manner and at such times as the court or judge thereof may, by order or decree, direct. Any residual amount after all required payments have been made shall be paid to the plaintiff if such amount is more than five dollars ($5). If the amount is five dollars ($5) or less, it shall be transferred to the General Fund by the State Controller. (emphasis added)

Because the plaintiff in an eminent domain action is the person seeking to take the property, Code Civ. Proc. § 1250.210, the "plaintiff" referred to in the above statute is the condemnor. The statute clearly requires the payment of interest to the condemnor, not to the condemnee.[5] Petitioner, the condemnee, was not entitled to the interest he is claiming. As the state appellate court found, "BART was acting in accordance with the law when it accepted payments of the interest on the deposit." Order, p. A-5.

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[5] Government Code section 16429, subdivision (c) is a reenactment of former Code of Civil Procedure section 1254, subdivision (i). Law Rev. Comm. comm. to Gov. Code, § 16429. Former Code of Civil Procedure section 1254 was in effect at the time BART deposited the judgment award in the Condemnation Deposits Fund. Thus, at all times relevant to this case, state law required that payment of interest on such deposited funds be paid to the condemnor.

The state appellate court correctly affirmed the decision sustaining the demurrer on the grounds that "BART, as a matter of law, was entitled to the interest earned." Order, p. A-6.

II

THE STATE APPELLATE COURT'S APPLICATION OF THE DOCTRINE OF RES JUDICATA WAS PROPER AND DOES NOT RAISE FEDERAL OR CONSTITUTIONAL ISSUES

The appellate court correctly held that petitioner's allegations that BART condemned his "air rights" without appraising those rights or providing just compensation for them, sold those rights to the City of Berkeley without his permission, condemned his property without a public purpose, and condemned his property in retaliation for his having filed a taxpayer's suit against BART were all attacks on the 1966 judgment in condemnation and were barred by the doctrine of res judicata.

The doctrine of res judicata is part of the common law of California and is also reflected in state statutes. *See, e.g., Salter v. Blackwood*, 15 Cal.3d 791, 543 P.2d 593, 126 Cal.Rptr. 225 (1975); Cal. Code Civ. Proc. § 1908. The doctrine "gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy." 7 B. Witkin, *California Procedure* (3d ed. 1985), Judgment § 188, p. 621 (emphasis in original). Petitioner could not state a new cause of action by attacking a condemnation judgment that had been final for 22 years. Witkin, *supra*, Judgment § 261, p. 702 ("If a title or interest in property was in issue in a former action, the judgment is conclusive in later proceedings involving the same title or interest. [citations omitted]").

Therefore, the state appellate court correctly concluded that petitioner's allegations regarding actions taken by BART in the mid-1960's eminent domain action—including his claim that he was entitled to prejudgment interest beginning on November 25, 1964 when the complaint was filed—were barred. As it stated,

> All of the claims we have described with respect to condemnation of air rights, condemnation without a proper public purpose, and condemnation for retaliation, could have been raised as objections to the right of BART to take appellant's property. (Code Civ. Proc., §§ 1250.360, 1250.370.) Thus, they clearly involve the "same controversy." The trial court correctly concluded that: "The Judgment in Condemnation and Final order of Condemnation gave BART ownership of the entire fee including the air rights. (Civ. Code, § 829.) Furthermore, the judgment was a final determination of BART's right to condemn the property and the amount of just compensation for the fee simple absolute including the air rights."

Order, A-7.

In determining that petitioner's claims were barred by res judicata, the state appellate court interpreted California's procedural and substantive rules. No federal constitutional, statutory, or common law was implicated by that decision. Moreover, federal law recognizes the importance of affording res judicata effects to decisions of state courts, both in the full faith and credit clause of the Constitution, Art. IV, § 1, and in the federal full faith and credit statute, 28 U.S.C.A. § 1738. Thus, not only is no federal question implicated by the state court decision at issue here, but federal law supports the state appellate court's decision giving res judicata effect to the 1966 judgment in condemnation.

III

THE STATE TRIAL COURT PROPERLY DECIDED THAT PETITIONER'S ALLEGATIONS WERE BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS

The state trial court sustained BART's demurrer on the additional ground that petitioner's claims that BART "fraudulently" took his "air rights" and "unnecessarily" condemned his business were barred by the applicable statute of limitations. If these allegations were construed as an attempt to plead a cause of action for inverse condemnation, the applicable statute of limitations would be either three years or five years. *Mehl v. People ex*

rel. Department of Public Works, 13 Cal.3d 710, 717, 532 P.2d 489, 119 Cal.Rptr. 625 (1975). Whichever statute applied, the period began to run when the "damage [was] sufficiently appreciable to a reasonable man." (*Id.* at 717.)

Petitioner alleged in his Second Amended Complaint that the taking began on October 20, 1964. Therefore, the statute of limitations began running on that date and expired in either 1967 or 1969. Regardless of which statute applied, the "taking" allegations raised in petitioner's 1988 complaint were clearly barred. With respect to his air rights, petitioner knew or should have known that the air rights were included in the valuation of his fee, because California Civil Code section 829 has long provided that a fee interest includes the surface of land and everything below and above it. The valuation issue was settled by the Judgment in Condemnation entered on May 3, 1966, and the statute of limitations bars any attack on that judgment.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted

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May 1991

Appendix A

In the Court of Appeal of the State of California

First Apppellate District

Division One

Raymond Dobard,
Plaintiff and Appellant,

v.

San Francisco Bay Area Rapid Transit District et al.,
Defendants and Respondents.

A045389

(Alameda County Super. Ct. No. 642762-5)

[Filed Sept. 28, 1990]

Raymond Dobard, appearing in propria persona, appeals from an order sustaining a demurrer to his second amended complaint against San Francisco Bay Area Rapid Transit District (BART), Keith Bernard, Michael Sharpe, Ernest Howard, and Gray Davis.[1] We will affirm the judgment.

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[1] An order sustaining a demurrer without leave to amend is not an appealable order. (*Mounger v. Gates* (1987) 193 Cal.App.3d 1248, 1254.) The superior court did, however, subsequently file a statement of decision in which it clearly stated the multiple reasons why Dobard could not state a cause of action. Although the statement of decision does not technically qualify as a judgment, it is obvious that the court intended by its order to enter judgment dismissing all causes of action. Thus to avoid any further delay, this court exercises its power to amend the order to include a judgment of dismissal of the second complaint. (*Randle v. City and County of San Francisco* (1986) 186 Cal.App.3d 449, 453-454.)

FACTS

Approximately 20 years ago, BART initiated eminent domain proceedings against certain real property owned by Dobard.[2] On May 3, 1966, a judgment in condemnation and a final order of condemnation were entered. The judgment in condemnation provided that upon BART's payment into court of the amount of $79,500, BART would become the owner of the real property described in the judgment. The payment of $79,500 was for the benefit of Raymond Dobard, his wife Jeanne Dobard, Adah Taylor, Allyne Graff Bacher, Georges Courtois, Roger Courtois and the County of Alameda. The judgment in condemnation further provided that the sum of $15,873.23, the amount of a lien granted to Adah Taylor in a separate action against Dobard and his wife, should be held in the custody of the court until the final disposition of the appeal in that separate matter. Any amount remaining after the payment of amounts owed on a promissory note and taxes was to be paid to Dobard and his wife. The final order of condemnation stated that BART, having paid the amount of $79,500 into court, was the owner in fee simple absolute of the property. On September 2, 1966, the court entered an order for withdrawal of the judgment award and for deposit in the state treasury. The judgment award was thereupon deposited in the state treasury.

Dobard did not withdraw the principal for many years. The entire principal remained on deposit until October 1970. Thereafter principal was withdrawn at intervals, leaving the principal amount of $2,036.52 as of November 1981. The total interest

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[2] These facts are derived from Dobard's pleadings and the voluminous exhibits thereto, and from court records judicially noticed by the court below. Although a demurrer normally is limited to the face of the pleading, the court may also consider any matter judicially noticed. (Code Civ. Proc., § 430.30, subd. (a); *Dryden v. Tri-Valley Growers* (1977) 65 Cal.App.3d 990, 997.) The court may also read the complaint as if it included facts set forth in exhibits to the complaint. (4 Witkin, Cal. Procedure (3d ed. 1985) § 385, pp. 433-434.) Moreover, if the allegations of the complaint conflict with recitals set forth in exhibits to the complaint, the exhibit will control. (*Id.*, citing *Alphonzo E. Bell Corp. v. Bell etc. Synd.* (1941) 46 Cal.App.2d 684, 691.)

accrued from the date of the initial deposit was $60,058.27, and as of 1988 that amount had been paid to BART pursuant to Government Code section 16429.

On September 12, 1988, Dobard filed a complaint against BART. After the court sustained two demurrers with leave to amend, Dobard filed a second amended complaint. The underlying wrongs alleged in the second amended complaint were substantially similar to the original complaint. With respect to each cause of action, Dobard alleged that BART had condemned his real property unnecessarily, without a valid public purpose, and in retaliation against him for having filed a taxpayer's suit against BART; that BART failed to compensate him for the air rights to his property and then sold the air rights to the City of Berkeley; and that BART had misled Dobard into believing that the interest earned on the deposit was payable to him and converted the interest earned on the condemnation deposit to its own use. These basic factual allegations were then incorporated into the following causes of action: Continuing conspiracy to interfere with civil rights, fraudulently taking air rights without compensation, breach of fiduciary duty, intentional infliction of emotional distress, breach of public policy, and denial of due process.

The court sustained the demurrer to the second amended complaint without leave to amend. At Dobard's request the court, on February 16, 1989, filed a detailed statement of decision explaining that each of the causes of action alleged in the second amended complaint failed to state a cause of action for one or a combination of the following reasons: (1) Pursuant to Government Code section 16429, BART was entitled to the interest earned on the condemnation deposit; (2) any attack on the propriety of the condemnation proceedings was barred by res judicata; and (3) Dobard's causes of action were barred by the statute of limitations. Dobard filed a motion for reconsideration on February 21, 1989, and the court denied that motion on April 6, 1989. Dobard filed his notice of appeal on March 10, 1989.

ANALYSIS

It would be impossible to respond to each of the arguments in appellant's brief without substantially confusing the issues on appeal. We therefore confine our analysis to the allegations of the second amended complaint and whether the court correctly sustained the demurrer to each cause of action. Each cause of action was based on the same underlying allegations that (1) BART converted interest earned on the condemnation award that should have been invested for Dobard's benefit; and (2) BART fraudulently took appellant's air rights without just compensation and thereafter sold them to the City of Berkeley, unnecessarily condemned his property for no public purpose, and condemned appellant's property to retaliate against appellant for filng a taxpayer's suit against BART. As we shall explain below, to the extent that each cause of action was based on the allegation that BART converted the interest in the judgment deposited in the state treasury, the demurrer as to each cause of action was properly sustained because BART was entitled to the interest on the judgment award. Moreover, to the extent that any cause of action was based on a challenge to the condemnation proceedings, that cause of action is barred by re judicata.

1. BART Was Legally Entitled to Accept Payments of Interest on the Deposit.

As the trial court explained, "under Civil Procedure section 1268.320(b)[3] and its predessor, former section 1255b(c),[4] interest ceased to accrue on the date the judgment funds, including

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[3] Section 1268.320 provides in pertinent part: "The compensation awarded in the proceeding shall cease to draw interest at the earliest of the following dates: . . . (b) As to the amount deposited in accordance with Article 2 . . . the date of such deposit."

[4] Former section 1255b, subdivision (c), which was in effect at the time judgment was entered in 1966 in this case, provided in relevant part: "The compensation and damages awarded in an eminent domain proceeding shall cease to draw interest on the earliest of the following dates: . . . (4) If the full amount the defendant is then entitled to receive as finally determined in the eminent domain proceeding together with the full amount of the interest then due thereon is paid into court for the

interest accrued to that date, were deposited by BART in court, i.e., on May 3, 1966. Therefore, [Dobard] has not been entitled to any interest on the judgment at any time since BART deposited the funds in court."

Moreover, pursuant to Government Code section 16429, subdivision (c), the interest on any deposit in the Condemnation Deposits Fund is payable to the "plaintiff," i.e., the condemnor.[5] Thus, as a matter of law, BART was acting in accordance with the law when it accepted payments of the interest on the deposit.

Appellant's mistaken belief that he was wrongfully deprived of interest on the award is based on an apparent misunderstanding of the law and facts. He attaches great importance to a letter he received in 1976 in which a BART official responded to his request for an accounting of interest. The letter explained that, as Dobard apparently was aware, the funds were available for withdrawal at anytime. The last paragraph, in response to Dobard's demand for the interest, stated that if Dobard obtained a court order requiring that BART pay to Dobard the interest it had been paid, BART would comply. Dobard interprets this letter as an attempt to mislead him into believing that BART would pay the interest to him, and to conceal from him the fact that BART was entitled to the interest so long as the deposit remained in the state treasury. The letter, however, is not reasonably susceptible of such a construction. It does no more than state the obvious fact that if Dobard could persuade a judge that he was entitled to the interest, BART would comply with the court's order. The court was entitled to rely on the document attached as an exhibit to the complaint, rather than the general allegations of fraud. (4 Witkin, Cal. Procedure, *supra*, § 385, pp. 433-434; citing *Alphonzo E. Bell Corp. v. Bell etc. Synd., supra*, 46 Cal.App.2d 684.)

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defendant after entry of judgment, the date of such payment." (Stats. 1961, ch. 1614, § 10, p. 3451.)

[5] Government Code section 16429, subdivision (c) is a reenactment of former Code of Civil Procedure section 1254, subdivision (i), which was in effect at the time BART deposited the funds in 1966. (Law Rev. Comm. com. to Gov. Code, § 16429.)

Dobard also contends that BART failed to comply with the procedures applicable to eminent domain in "taking" the interest. Assuming arguendo that these procedures apply to the taking of personal property, BART was entitled to the interest and thus no "taking" occurred.

Dobard further argues that Code of Civil Procedure section 1268.150, subdivision (b), required that BART "deposit and invest appellant's judgment award . . . for the benefit of appellant." Section 1268.150, however, applies only if "after entry of judgment but prior to apportionment of the award the defendants are unable to agree as to the withdrawal of all or a portion of any amount deposited," and one of the defendants files a motion requesting investment of the funds for the benefit of the defendants pending resolution of the dispute. (Code Civ. Proc., § 1268.150, subd. (b).) Dobard does not allege either that a dispute over apportionment occurred or that he, or any other defendant in the eminent domain proceeding, filed such a motion. Thus, section 1268.150 is clearly inapplicable.

We therefore conclude that to the extent each cause of action was based on allegations that BART had converted or wrongfully deprived appellant of interest on the condemnation deposit, the court properly sustained the demurrer because BART, as a matter of law, was entitled to the interest earned.

2. Any Attack on the Prior Judgment in Condemnation Was Barred By Res Judicata

The remaining allegations of the complaint, incorporated into each cause of action, were that BART condemned his "air rights" without appraising them or providing just compensation, sold them to the City of Berkeley without his permission, condemned his property without a public purpose, and condemned his property in retaliation for his having filed a taxpayer's lawsuit against BART. These allegations amount to an attack on the 1966 judgment in condemnation and are barred by the doctrine of res judicata.

It is elementary that "[t]he doctrine of *res judicata* gives certain *conclusive effect* to a *former judgment* in subsequent litigation involving the same controversy. It seeks to curtail

multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration* . . . ." (7 Witkin, Cal. Procedure (3d ed 1985) Judgment § 188, p. 621; italics in original.)

"The doctrine of res judicata is a part of the common law of this state (*Slater v. Blackwood* (1975) 15 Cal.3d 791 [126 Cal.Rptr. 225, 543 P.2d 593]) and also is reflected in such statutes as Code of Civil Procedure section 1908.

"Restatement Second Judgments views the doctrine as a bar or merger applicable to subsequent litigation between the same parties concerning the same controversy with very few exceptions. The Restatement's approach is based on the assumption that there has been an opportunity in the first litigation for a fair and full hearing of the claim asserted. Once that opportunity has been afforded, the Restatement Second asserts, fairness dictates that the controversy in question be put to rest." (*Nakash v. Superior Court* (1987) 196 Cal.App.3d 59, 67-68.)

All of the claims we have described with respect to condemnation of air rights, condemnation without a proper public purpose, and condemnation for retaliation, could have been raised as objections to the right of BART to take appellant's property. (Code Civ. Proc., §§ 1250.360, 1250.370.) Thus, they clearly involve the "same controversy." The trial court correctly concluded that: "The Judgment in Condemnation and Final order of Condemnation gave BART ownership of the entire fee including the air rights. (Civ. Code, § 829.) Furthermore, the judgment was a final determination of BART's right to condemn the property and the amount of just compensation for the fee simple absolute including the air rights."

Appellant argues that, somehow, the allegation that BART concealed its plan to sell the air rights preserves this claim, despite the fact that, in substance, it is nothing more than an attempt to collaterally attack the finality of the 1966 judgment. Even if BART did "conceal" its plan to sell the air rights to the City of Berkeley, this fact would not state a cause of action. BART as the condemnor had no duty to explain to Dobard, an adverse party, that the condemnation included the air rights. Nor

did BART have any duty to disclose any plans it may have had to sell those rights. Pursuant to Code of Civil Procedure section 1240.120, subdivision (b), condemnors may acquire property "with the intent to sell, lease, exchange, or otherwise dispose of the property, or an interest therein. . . ." Thus, even if we accept as true Dobard's allegation that BART did not disclose its plan to sell the air rights to the City of Berkeley during the eminent domain proceedings, that fact fails to state a cause of action.

We therefore conclude that to the extent that each cause of action was based on allegations that BART failed to compensate Dobard for the air rights; or that it condemned his property unnecessarily and without a public purpose, and in retaliation for filing a taxpayer's lawsuit; the demurrer was correctly sustained on the ground that the cause of action was barred by res judicata.

CONCLUSION

The judgment is affirmed.

Stein, J.

WE CONCUR:

Racanelli, P.J.

Newsom, J.